IN THE SUPREME COURT OF THE STATE OF VERMONT
DOCKET NO. 2019-266

State of Vermont, Appellant

v.

Max Misch, Defendant-Appellee

APPEAL FROM SUPERIOR COURT, CRIMINAL DIVISION (BENNINGTON)
Docket No. 173-2-19 Bncr

BRIEF BY ROBERT KALINOWSKI JR. AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE MAX MISCH

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INTEREST OF THE AMICUS CURIAE

Robert Kalinowski Jr. is a lifelong Vermonter and dedicated public servant. In 2010, he retired as Lieutenant from the Vermont State Police after serving for nearly 26 years. He spent approximately 18 years working the road in uniform, and he spent the last six years of his career as the Director of Training. One of his responsibilities was supervising the firearms program. Following his retirement, Mr. Kalinowski served as a Lieutenant with the Bennington County Sheriff's Office through 2019, where he was the training coordinator and lead firearms instructor. Presently, Mr. Kalinowski is a Range Safety Officer at the Hale Mountain Fish and Game Club. In all, he has spent nearly 2000 hours instructing firearms and various levels of use of force. Based on his nearly 34-year career in law enforcement and his experience as a firearms instructor, Mr. Kalinowski believes that restricting magazine capacity will not reduce crime but rather will penalize and endanger law-abiding, responsible citizens. He submits this brief in support of the Article 16 rights of Vermont's citizens. Amicus files this brief with the consent of all parties.

INTRODUCTION

On April 11, 2018, the State of Vermont banned the sale, purchase, and possession of standard-capacity ammunition magazines—pejoratively dubbed "large capacity ammunition feeding devices." State law now provides that "[a] person shall not manufacture, possess, transfer, offer for sale, purchase, or receive or import into this State a large capacity ammunition feeding device," which the law defines generally as an ammunition magazine that has the capacity to accept "more than 10 rounds of ammunition for a long gun," or "more than 15 rounds of ammunition for a hand gun." 13 V.S.A. § 4201(a), (e)(1). While the State frames the prohibition as a ban on "large capacity" magazines, the banned magazines are common to the point of ubiquity. They come

standard on the most popular rifles and handguns in the nation, are legal in the vast majority of states, and are owned by tens of millions of law-abiding citizens throughout the United States.

The court below erred when it denied Defendant Misch's motion to dismiss. Whereas Vermont's law bans the possession of these common magazines—by *anyone*, in *any place*, and for *any purpose*—it is categorically unconstitutional. That conclusion follows from *State v. Rosenthal*, 75 Vt. 295 (1903), which struck down a ban carrying common arms concealed in public as "repugnant to and inconsistent with the Constitution" without addressing the State's contentions that the ban was a necessary and reasonable public-safety measure. *Id.* at 295.

Even if the Court accepts the trial court's decision to examine whether the magazine ban reasonably advances public safety, it must still fail because there is no evidence that banning the standard-capacity magazines in question will cause *any* appreciable increase in public safety. Indeed, Vermont has long been one of the safest states in the Nation despite traditionally not enacting burdensome firearm regulations. Governor Scott properly stated that "I don't think [the magazine ban] was necessary." Gov. Phil Scott, *Primary Forum: Republican Candidates for Vermont Governor* (July 25, 2018). The Court should find Section 4201's ban on these common magazines unconstitutional.

ARGUMENT

Article 16 of Vermont's Constitution provides "[t]hat the people have a right to bear arms for the defence of themselves and the State." VT. CONST. art. 16. Because the magazine ban prohibits possession of common firearm magazines, it "is inconsistent with and repugnant to the Constitution." *Rosenthal*, 75 Vt. at 295. The State resists this conclusion, arguing instead for an "intermediate scrutiny" test that has been adopted in the Second Amendment context by some federal courts or a malleable "reasonableness" review. Those approaches cannot be squared with

Article 16's text and history, with case law enforcing it, or with Vermont's broader constitutional jurisprudence or traditions.

III. Vermont's Ban Is Categorically Unconstitutional Under Article 16

Article 16 protects Vermont citizens' "right to bear" the magazines in question "for the defence of themselves and the State." The principal effect of Section 4021 is to define a particular class of arms—"large capacity ammunition feeding device[s]"—and then ban the purchase, sale, and possession of them. 13 V.S.A. § 4021(a), (e). Section 4021's ban on possession by anyone (including law-abiding citizens), at any time (including in their homes), and for any purpose (including self-defense), is at odds with Article 16's guarantee, and it cannot stand under any form of scrutiny or analysis that conceivably could apply. If the State enacted a law flatly forbidding all Catholics in the State from attending worship, such a law plainly would be invalid categorically, as directly contrary to the freedom of religion, no matter what kind of rationale the legislature offered for the ban. VT. CONST. art. 3. If the State enacted a law banning Vermont citizens from voting for any candidate affiliated with the socialist party, this Court would strike down that law as unconstitutional *per se* and repugnant to the right to free elections. VT. CONST. art. 8. Vermont's law forbidding the possession of protected arms for self-defense is no less a frontal assault on the core right protected by Article 16.

This is clear from *Rosenthal*, 75 Vt. at 295. The case dealt with a Rutland ordinance forbidding anyone from "carry[ing] any weapon concealed on his person, without permission of the mayor or chief of police." *Id.* Rosenthal was convicted under this law for carrying "a pistol loaded with powder and bullets, concealed on his person," and he defended by arguing the ordinance was "repugnant to and inconsistent with the Constitution and the laws of this state." *Id.* This Court agreed. Under Article 16, the Court noted, "[t]he people of the state have a right to bear

arms for the defense of themselves and the state;" and while state law regulated that right in certain ways—for example, by making it a crime to carry "with the intent or avowed purpose of injuring a fellow man"—as a general matter a law-abiding citizen "is at liberty . . . to carry such weapons" either openly or concealed. *Id.* Because the challenged ordinance banned the carrying of a pistol "in any circumstances, [and] for any purpose," this Court held that the ordinance "is inconsistent with and repugnant to the Constitution . . . of the state and it is therefore to that extent, void." *Id.* The Court did not ask whether the law was "reasonable," nor did it entertain any argument from the State that the ban on concealed carry was justified by the State's interest in preventing crime and promoting public safety. No, because the ordinance was "inconsistent with and repugnant to the Constitution," this Court declared it "void" categorically, without further analysis. *Id.* So too here, Section 4201's categorical ban on these common magazines should be declared void categorically.

Vermont courts have taken a similar, categorical approach in the context of other constitutional rights. For instance, when a program giving public funds to religious organizations is challenged under Article 3's demand that "no person ought to, or of right can be compelled to . . . erect or support any place of worship," VT. CONST. art. 3, this Court has held that "the critical question is whether the funds will support worship." *Taylor v. Town of Cabot*, 2017 VT 92, ¶ 30, 178 A.3d 313, 323 (2017). If so, the program is unconstitutional, period—without any inquiry into whether the funding of worship is "reasonable." *See Chittenden Town Sch. Dist. v. Dep't of Educ.*, 169 Vt. 310, 343, 738 A.2d 539, 562 (1999).

The use of a categorical approach to enforce Article 16's protections is also supported by the United States Supreme Court's decisions in *Heller*, *McDonald*, and *Caetano*. In *District of Columbia v. Heller*, the U.S. Supreme Court struck down the District of Columbia's ban on

possessing handguns as categorically inconsistent with the federal Second Amendment right and thus unconstitutional "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights." 554 U.S. 570, 628 (2008). The Court refused the plea by the District to apply an "interest-balancing inquiry that asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests," reasoning that "[t]he very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Id.* at 634–35 (internal quotation marks omitted).

McDonald and *Caetano* also support a categorical analysis. In *McDonald*, the Supreme Court described *Heller*'s holding as a simple syllogism: having "found that [the Second Amendment] right applies to handguns," the Court "concluded" that "citizens must be permitted to use handguns for the core lawful purpose of self-defense." *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 767–68 (2010) (internal quotation marks and brackets omitted). Then, in *Caetano*, the Court summarily reversed a decision of the Massachusetts Supreme Judicial Court that departed from this approach in upholding a ban on stun guns. *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1030–33 (2016). The Massachusetts court got the message: "Having received guidance from the Supreme Court in *Caetano II*, we now conclude that stun guns are 'arms' within the protection of the Second Amendment. Therefore, under the Second Amendment, the possession of stun guns may be regulated, but not absolutely banned." *Ramirez v. Commonwealth*, 94 N.E.3d 809, 815 (Mass. 2018); *see also People v. Webb*, 131 N.E.3d 93, 99 (Ill. 2019) (same); *Wrenn v. District of Columbia*, 864 F.3d 650, 665 (D.C. Cir. 2017) (striking down restriction on public carry as categorically unconstitutional); *Moore v. Madigan*, 702 F.3d 933, 942 (2012) (same).

Section 4021 likewise is an outright ban on possessing common, constitutionally protected arms—even in the home, and even for the core, textually enumerated purpose of self-defense. It thus flatly prohibits *anyone* from engaging in the very conduct Article 16's guarantee protects. To uphold such a law is, in effect, no different from amending the Constitution to *remove* the Article 16 right. The courts have no such power, and the legislature may only amend the Constitution pursuant to the procedures set forth in Chapter 2, § 72.

a. The Trial Court Improperly Employed an Intermediate Scrutiny Test

The court below improperly weighed Section 4021's constitutionality under an "intermediate scrutiny" standard, asking whether the challenged law is "substantially related to the achievement of an important government interest." Decision on Mot., *State of Vermont v. Max Misch*, Case No. 173-2-19 at 5 (June 28, 2019) ("Trial Op.") (internal quotation marks omitted).

The Court is bound to reject the "intermediate scrutiny" analysis at the threshold, because that approach is inconsistent with *Rosenthal*. There, as discussed above, the Court struck down a ban on the unlicensed carrying of concealed firearms as unconstitutional *per se*, without engaging in *any analysis* of whether the ban was related to an important State interest. There is no suggestion in the Court's opinion that the ordinance there would have been any less "inconsistent with and repugnant to the Constitution" had the Government come forward with evidence of its necessity as a crime-prevention measure. *Compare* Trial Op. at 5, *with Rosenthal*, 75 Vt. at 295.

That is not because interest-balancing arguments had not been considered. To the contrary, while carrying firearms openly was generally freely allowed in the late nineteenth and early twentieth centuries, "the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues," *Heller*, 554 U.S. at 626, based on the theory that restricting concealed carrying

specifically was necessary "to prevent bloodshed and assassinations committed upon unsuspecting persons," *State v. Chandler*, 5 La. Ann. 489, 489–90 (1850); *see also, e.g.*, *State v. Reid*, 1 Ala. 612, 616 (1840). And the Government pressed precisely these arguments in *Rosenthal*, urging that "[i]n cities, it is quite apparent, there is a necessity of regulating the use and carrying of dangerous weapons, more especially concealed ones," and that the challenged ban was "reasonable, not oppressive and is for the well-being of the city." Plaintiff's Br. at 3, *State v. Rosenthal* (May 1903). The Government emphasized that the ordinance left open the option of openly carrying a firearm and even allowed concealed carry with government permission. *Id.* at 2. This Court's decision not to uphold the ban based on this line of reasoning was thus a conscious rejection of the very type of interest-balancing approach advocated by the State today.

The trial court suggests that *State v. Duranleau*, 128 Vt. 206, 260 A.2d 383 (1969), supports an interest-balancing inquiry, but that is not so. Trial Op. at 3. In *Duranleau*, the court considered a fish-and-game law making it unlawful "to carry a loaded rifle or shotgun in a vehicle on a public highway without a special permit." *Id.* at 207. This Court held that this law did not violate Article 16, reasoning that although it "somewhat conditions the unrestrained carrying and operation of firearms, . . . [t]o require that two particular kinds of weapons, at certain specific places and under limited circumstances, be carried unloaded rather than loaded, is not such an infringement on the constitutional right to bear arms as to make the statute invalid." *Id.* at 210. The marginal restriction at issue in *Duranleau* is nothing like the ban on concealed carrying at issue in *Rosenthal*, and it is incomparable to the magazine ban in this case, which affects the possession of popular ammunition magazines in all places and under all circumstances. *Duranleau* contains nothing that can be read as repudiating the categorical analysis adopted in *Rosenthal* for such broad bans.

The trial court disagreed, contending *Duranleau* holds that the Article 16 right may be

restricted if "the statutory purpose is reasonable." Trial Op. at 3 (quoting *Duranleau*, 128 Vt. at 210). But *Duranleau* looked to whether "the statutory purpose [was] reasonable" only *after* concluding that the restriction was so insignificant that it did not impermissibly infringe the right to bear arms. 128 Vt. at 210. Determining that "the statutory purpose [was] reasonable," *id.*, was thus a *necessary* condition for the law's constitutionality. *Duranleau*, however, does not suggest that the law's "reasonableness" alone was *sufficient* to uphold it and the trial court was wrong to read the case as adopting an interest-balancing inquiry.

Setting this Court's case law to the side, the Court should decline to rely on federal lower-court decisions adopting intermediate scrutiny for independent reasons. As an initial matter, *Heller* requires the categorical approach Amicus advocates and *specifically rejects* the interest-balancing test proposed by Vermont. *See Heller*, 554 U.S. at 634–35. Moreover, interest-balancing tiers-of-scrutiny analyses are a twentieth century invention with the purpose and effect of limiting individual rights. *See* John Ohlendorf & Joel Alicea, *Against the Tiers of Constitutional Scrutiny*, NATIONAL AFFAIRS (Fall 2019), https://bit.ly/32PSnlV. The Court should not further expand their reach. Therefore, to the extent this Court concludes that Article 16 should be interpreted as imposing a form of scrutiny parallel to that required by the Second Amendment, it should look to the Supreme Court's articulation of the proper Second Amendment analysis, not the misguided approach adopted by some lower federal courts.

In any event, the premise that Article 16 and the federal Second Amendment must be interpreted in lockstep is flawed. This Court has cautioned against "legal argument [that] consists of a litany of federal buzz words memorized like baseball cards," insisting instead on an independent development of "a state constitutional jurisprudence that will protect the rights and liberties of our people, however the philosophy of the United States Supreme Court may ebb and

flow." *State v. Jewett*, 146 Vt. 221, 223–24, 500 A.2d 233, 235 (1985). To determine whether a state constitutional right is broader than a similar federal right, Vermont courts look for "textual differences" between the two rights, inquire whether "historical considerations" call for broader state protections, and examine any relevant "policy considerations." *State v. Rheaume*, 176 Vt. 413, 421, 853 A.2d 1259, 1264 (2004). Based on these considerations, Vermont courts have not hesitated to interpret the Vermont Constitution as providing greater protection of individual liberty. *See, e.g.*, *Selectmen of Windsor v. Jacob*, 2 Tyler 192 (1802) (holding slavery unconstitutional under the Vermont Constitution, notwithstanding its constitutionality under the U.S. Constitution). Here, too, these factors show that the Court should not parrot the lower-federal-court cases upholding bans like Vermont's.

Instead, this Court should begin with the text. While Article 16 expressly protects Vermont citizens' "right to bear arms for the defence of themselves," VT. CONST. art. 16, the Second Amendment does not specify that "the right of the people to keep and bear Arms" that it protects extends specifically to individual self-defense, U.S. CONST. amend. II. Accordingly, for much of the Nation's history the federal Second Amendment was widely read by the lower courts as protecting only the collective right to bear arms in the militia setting. *See, e.g.*, *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710 (7th Cir. 1999); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976); *Cases v. United States*, 131 F.2d 916, 921 (1st Cir. 1942). To be sure, in *Heller*, the U.S. Supreme Court conclusively interpreted the Second Amendment as also protecting "the individual right to possess and carry weapons in case of confrontation," 554 U.S. at 592, but that holding does not erase the clear "textual differences" between the two constitutional provisions, *Rheaume*, 2004 VT 35, at ¶ 16—textual differences that precluded any argument that Article 16's right was purely militia-based from the very beginning.

The "social and political setting in which [Article 16] originated," *Jewett*, 146 Vt. at 226, also augurs against reflexively adopting the lower federal courts' approach. Vermont's tradition of bearing arms for defense of self and state is unique, and it dates to the origins of the State. Vermont achieved independence only after decades of struggle not just against the British but also against land speculators from New York, who sought to colonize the land in the "New Hampshire grants" that would later become Vermont. 2 SAMUEL WILLIAMS, THE NATURAL AND CIVIL HISTORY OF VERMONT 16–19 (1809). The New York speculators' efforts to displace the existing settlers of the land, as Vermont later described its early history in a 1777 letter to Congress, "reduced [the Vermonters] to the disagreeable necessity of taking up arms, as the only means left for the security of their possessions." *Declaration and Petition to Congress* (Jan 15, 1777), in 1 RECORDS OF THE COUNCIL OF SAFETY AND GOVERNOR AND COUNCIL OF THE STATE OF VERMONT 48, 49 (1873).

In one famous incident, officials from New York sought multiple times, over a series of months, to survey and occupy the Breakenridge Farm in Vermont but were prevented from doing so by the Green Mountain Boys, who resisted each effort by gathering with arms to prevent the New Yorkers from entering the land. *See* ROBERT E. SHALHOPE, BENNINGTON AND THE GREEN MOUNTAIN BOYS 71–73 (1996). The altercation culminated in June 1771, when an Albany sheriff, accompanied by 750 armed men, sought to evict the inhabitants of the farm but was outmaneuvered by a company of about 300 Green Mountain Boys, who managed to surround the "Yorkers" and catch them by surprise, forcing them to retreat without firing a shot. IRA ALLEN, THE NATURAL AND POLITICAL HISTORY OF THE STATE OF VERMONT 26-28 (1798).

It was this same voluntary militia, under Ethan Allen's leadership, that boldly seized Fort Ticonderoga on May 10, 1775. After the militia procured "a quantity of powder and ball," Allen

raised "all the men that he could find" and advanced to Lake Champlain, where he and his men entered the fort unopposed in the early hours of the 10th and demanded the surrender of the fort. The British Captain in charge, still unaware that hostilities had broken out, surrendered the garrison and their valuable stores of cannon, ammunition, and military stores without bloodshed. JAMES D. MCCABE, THE GREAT REPUBLIC: A DESCRIPTIVE, STATISTICAL AND HISTORICAL VIEW OF THE STATES AND TERRITORIES OF THE AMERICAN UNION 220 (1871). The Continental Congress was so impressed by the Green Mountain Boys' initiative in seizing the Fort that they voted to pay them, in gratitude for their service to the cause. *Id.*

The early Vermonters were bearing arms in defense of themselves and the State *even as they drafted the 1777 Constitution and Article 16* (then numbered as Article 15). In June 1777, Ira Allen and other delegates met in convention to take the first steps towards forming a formal government and framing a constitution. ALLEN, *supra*, at 62. The convention, among other actions, appointed a committee to examine the defenses at Ticonderoga, and then adjourned until early July. *Id.* While the Committee was at Ticonderoga, however, General Burgoyne appeared with a British army, and the Committee members paused their official business to muster men to the militia for defense of the Fort. *Id.* At the beginning of July, those militia leaders who were also delegates to the constitutional convention temporarily left the defense of Ticonderoga to travel to Windsor for the meeting of the convention. *Id.* At the very outset of their meeting, the convention received a dispatch from the Colonel defending the fort stating that General Burgoyne was poised to attack. Rev. Pliny H. White, *Before the Vermont Historical Society* (July 2, 1863), in 1 COLLECTIONS OF THE VERMONT HISTORICAL SOCIETY 56, 60-61 (1870) Over the next seven days, the convention drafted Vermont's first constitution, including the protection for the right to bear arms. On July 8th they received word that Fort Ticonderoga had been lost to the British. *Id.*

Because "[t]he families of many of the members . . . were within the very line of march of the triumphant enemy," the convention was anxious to finish their business "and fly to the defense of their homes," and the convention adjourned a short while later. *Id.*

The Vermont militia continued to "bear[ ] arms in defense of American liberty" throughout the rest of the war. Declaration and Petition to Congress, *The Declaration and Petition to Continental Congress*, VERMONT RECORDS. As a Vermont convention explained in 1776, "the principle which induced us [before the war] to take arms in defence of our possessions and properties, is that which now induces us to take arms and voluntarily join our friends and brethren in the several *United States*, for the defence of the liberties of the whole." *Manifesto Prepared and Published by Order of the Westminster Convention* (Oct. 30, 1776), in VERMONT RECORDS 390, 391.

Both before and after the war, Vermont's militiamen were required to provide their own firearms *and their own ammunition*. A 1776 resolution regulating the militia, for example, provided "that each non-commissioned officer and soldier immediately furnish himself with a good gun with a Bayonet, . . . one pound of powder, [and] four pound bullets, suitable for his gun." 1 JAMES B. WILBUR, IRA ALLEN, FOUNDER OF VERMONT, 1751-1814 87 (1928). Vermont's 1779 militia statute likewise required all members of the militia to "have in constant readiness[ ] a well-fixed firelock . . . or other good firearms" and "a cartouch box or powder and bullet pouch; one pound of good powder, four pounds of bullets for his gun, and six good flints." An Act for Forming and Regulating the Militia, Laws of Vermont 57, 59 (Feb. 16, 1779). Similarly, the federal militia act enacted in 1792 required each citizen enrolled in the militia to "provide himself with a good musket or firelock . . . and a knapsack, a pouch with a box therein to contain not less than twenty-four cartridges, suited to the bore of his musket or firelock." Act of May 8, 1792, 1 Stat. 271, 271.

There can be no doubt that, had they been in existence at the time, Vermont's citizens would have been required to muster for militia service *armed with the very magazines the State has now banned*.

Vermont's unique historical traditions continued into the nineteenth and twentieth centuries. As already discussed, *Rosenthal* adopted a robust interpretation of Article 16, striking down limits on carrying concealed firearms that were enacted and upheld in much of the rest of the Nation. *See Heller*, 554 U.S. at 626.

This history has endured to modern day. The State has long been known for entrusting its law-abiding citizens to possess and use firearms responsibly. In the late 1960s, when a variety of state and federal gun-control measures were first imposed, "the issue was a nonstarter in the Green Mountain State." Eric Benson, *Vermont's Long, Strange Trip to Gun-Rights Paradise*, THE TRACE (Aug. 15, 2018) https://bit.ly/2vJmQWt. The State early on adopted a firearm preemption law, forbidding local regulation of "the possession, ownership, transportation, transfer, sale, purchase, carrying, licensing, or registration of . . . firearms." 24 V.S.A. § 2295. In 1994, a bill providing for reporting of firearm sales died in committee. Benson, THE TRACE, *supra*. In 2000, the State Legislature vetoed a proposed Montpelier measure regulating the carrying of firearms in public; and in 2013, it blocked a similar measure from Burlington that would have banned certain semi-automatic rifles in response to the Newtown shooting. *Id.* As recently as 2018 the pro-gun-control Giffords Law Center organization gave the state an "F" for its gun laws. *See Annual Gun Law Scorecard*, GIFFORDS LAW CENTER (2018) https://bit.ly/32RjmNK.

Even Section 4021 was only adopted after out-of-state interest groups spent hundreds of thousands of dollars paying lobbyists to advocate for it and other gun-control measures. *See* Elections Division Lobbying, VERMONT SEC'Y OF STATE,

https://lobbying.sec.state.vt.us/Public/SearchByEmployer (search "Everytown for Gun Safety Action Fund" and "Giffords" 2015–16, 2017–18, and 2019–20). Indeed, Everytown—based in New York City and founded and funded by former New York mayor Michael Bloomberg—spent over $25,000 on Vermont lobbyists in the last four months of 2019 alone. The challenged ban on common ammunition magazines is not consistent with this State's unique history and traditions; instead it has been imposed by out-of-state interests seeking to *rewrite* those traditions.

Finally, the "policy considerations," *Rheaume*, 176 Vt. at 421, that partially underlie Vermont's unique history of robust, responsible gun ownership also favor interpreting Article 16 in a way that may be more protective than its federal cousin. Vermont has many areas that are rural and sparsely populated, where police presence is spotty and emergency-response times are lengthy. For many hours during the middle of the night there may be no police officers on duty in an entire county, and response times during these hours can be an hour or longer, depending on weather conditions. In these parts of the State, law-abiding citizens' need for effective means of self-defense is particularly acute. Section 4201 takes standard-capacity magazines out of the hands of the people of Vermont who rely upon them for self-defense—while exempting law enforcement officers from the ban. In a situation where Vermonters may be an hour or more from receiving police assistance, they have no choice but to act as their own first responder, and they have a right to be equipped with the defensive arms necessary to do so. Section 4201 strips the people of Vermont of this right.

b. The Trial Court Improperly Employed a Reasonableness Test

The court below erred by alternatively employing a "reasonableness test" in determining Section 4021's constitutionality. It is unclear how (or even whether) this "reasonableness test" differs from the intermediate scrutiny adopted in the federal context, but it is just as plainly

contrary to Article 16's text, history, and purpose. And as already shown at length, the approach adopted by *Rosenthal* is directly antithetical to any "reasonableness" test.

The trial court read *Rosenthal* as allowing "reasonable limitations" on the Article 16 right—presumably a reference to the laws, mentioned by *Rosenthal*, prohibiting carrying firearms "with the intent or avowed purpose of injuring a fellow man," maliciously "pointing a firearm toward another person, and . . . discharging such firearm so pointed," and carrying arms while "in attendance upon a school." 75 Vt. at 295. However, describing these as "reasonable limitations" on the right to bear arms for self-defense is rather like describing laws prohibiting voter identity theft and ballot-stuffing as "reasonable limitations" on the right to vote. Plainly, a person *maliciously shooting* a firearm at someone is not exercising the right to bear arms for self-defense *at all*; a law prohibiting such conduct is a ban on conduct that is not constitutionally protected to begin with.

In addition to *Rosenthal* and *Duranleau*, the trial court suggested that this Court "has applied a reasonableness test in interpreting other state constitutional provisions." Trial Op. at 3. But this Court's constitutional jurisprudence is not nearly as homogenous as the lower court suggests. While the court has looked at the "reasonableness" of legislation in some contexts, in others it hews to a more categorical approach. Moreover, where this Court has used some form of "reasonableness" analysis, it generally is in the context of rights that either by their text or history *expressly call for* an inquiry into reasonableness. *See In re Prop. of One Church St. City of Burlington*, 152 Vt. 260, 265 (1989) (Article 9's Proportional Contribution Clause only forbids tax schemes that are not "proportional"); *State v. Record*, 150 Vt. 84, 85 (1988) (Article 11 implicitly limited to right against "unreasonable" searches and seizures"). That type of inquiry has no place in the context of Article 16's unambiguous right.

In its brief, the State points to historical laws "regulating firearms in the interest of public safety" that, it argues, support "an interpretation of Article 16 that permits reasonable regulations." Br. for Appellant State of Vermont, at 16 (Oct. 14, 2019) ("Vermont Br."). But, for the most part, like the laws against assault mentioned in *Rosenthal*, the restrictions the State identifies are not limitations on the right to bear arms *at all*. Under no plausible interpretation would the people's "right to bear arms in defense of themselves" extend to such conduct as dueling or "robbery with intent to kill or maim." *Id*. Likewise, regulations governing where and how gunpowder may be stored, *id.*, do not meaningfully infringe the right of armed self-defense, *see Heller*, 554 U.S. at 632, and they are supported by fire-prevention interests wholly absent here. Nor does barring a "silencer" affect self-defense in the same way as does limiting the number of rounds a person my fire. *See* 13 V.S.A. § 4010(c)(4).

Finally, the State argues that "[m]ost other States apply a deferential reasonable regulation standard to gun safety laws challenged on state constitutional grounds." Vermont Br. at 24 (internal quotation marks and citation omitted). But the cherry-picked case-law from other states provides a flawed picture of reality. *See, e.g.*, *State v. Clay*, 481 S.W.3d 531, 534 (Mo. 2016) (because "the right to bear arms is a fundamental right, strict scrutiny must be used in analyzing the constitutionality of any regulation of that right"); *State ex rel. J.M.*, 144 So. 3d 853, 860 (La. 2014). Moreover, while the State and its amici ask the court to bless near limitless legislative discretion in their efforts to erode Article 16 of the Vermont Constitution, it should not be overlooked that the same out-of-state amici have poured money into in-state lobbying to advocate their unconstitutional ban. As noted above, Everytown and Giffords have spent hundreds of thousands of dollars lobbying for new gun-control measures in this State. This Court should not reflexively adopt whatever reasonableness standards prevail in other jurisdictions with a less robust history of

protecting the right to arms when it has reliably managed its own standards since the adoption of Article 16.

IV. Vermont's Ban Fails Interest-Balancing Review

Even if this Court concludes that Vermont's magazine ban is subject to some form of interest-balancing review, rather than *Rosenthal*'s categorical approach, the ban is still unconstitutional. That is so whether the inquiry is framed as the "intermediate scrutiny" that the federal cases the State cites purport to apply, or the "reasonableness review" that, according to the State, is applied in the context of some other state constitutional rights.

Under either analysis, this Court must do more than merely rubber-stamp "the Legislature's measured judgment that [the banned magazines] pose an unacceptable risk to public health and safety" in the way Vermont's amici ask. Amicus Br. of Giffords Law Center, et al.at 4 (Oct. 14, 2019) ("Giffords Amicus Br."). Under intermediate scrutiny, the Government must meet the "demanding" burden of showing that its restriction "serves important governmental objectives and that the . . . means employed are substantially related to the achievement of those objectives." *United States v. Virginia*, 518 U.S. 515, 524 (1996) (internal quotation marks omitted). The Government must show "a close fit between ends and means," and it may not burden "substantially more [protected conduct] than is necessary." *McCullen v. Coakley*, 573 U.S. 464, 486 (2014). Similarly, under the state-law "reasonableness" approach employed in some contexts, while the court is "broadly deferential to the legislative prerogative to define and advance governmental *ends*," it must "vigorously ensur[e] that the *means* chosen bear a just and reasonable relation to the governmental objective"—engaging in "a more stringent reasonableness inquiry than . . . generally associated with rational basis review under the federal constitution." *Baker v. State*, 170 Vt. 194, 203–04, 744 A.2d 864, 871 (1999) (internal quotation marks omitted).

Section 4021 fails either type of interest-balancing scrutiny, first, as a matter of law. By design and effect, Vermont's ban will reduce gun violence *only by reducing the quantity of the banned magazines*. Under Article 16, that is "not a permissible strategy"—even if used to the further end of increasing public safety. *Grace v. District of Columbia*, 187 F. Supp. 3d 124, 148 (D.D.C. 2016) (internal quotation marks omitted), *aff'd sub nom. Wrenn v. District of Columbia*, 864 F.3d 650. "Disarming . . . law-abiding citizenry is not a constitutionally-permissible policy choice." *Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1128 (S.D. Cal. 2017). For instance, in *Heller v. District of Columbia*, the D.C. Circuit struck down the District of Columbia's prohibition on registering more than one pistol per month, which was designed to "promote public safety by limiting the number of guns in circulation." 801 F.3d 264, 280 (D.C. Cir. 2015). The Court rejected that simplistic syllogism, explaining that "taken to its logical conclusion, that reasoning would justify a total ban on firearms kept in the home," and so it simply cannot be right. *Id.*; *see also City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 449 (2002) (Kennedy, J., concurring) (government may not attempt to reduce free speech's negative "secondary effects by reducing speech in the same proportion"). The Government may not adopt a law with the design and direct effect of limiting the quantity of conduct protected by the right to bear arms.

Section 4021 plainly violates this principle. The law does not regulate the *manner* of bearing arms or impose reasonable training and safety requirements. No, its purpose and effect is to *limit the number of arms borne by private citizens*, and to the extent this leads to a reduction of gun crime, that is only a byproduct of the law's central design and function: reducing the quantity of lawfully-possessed magazines. That line of reasoning is impermissible.

Even setting these threshold objections aside, the State's ban still fails any meaningful constitutional scrutiny. To show that its ban is reasonably related to the objective of reducing

crime, Vermont must prove that three propositions are sufficiently plausible: first, that its restriction will in fact reduce the number of banned magazines in criminal hands; second, that any such reduction will result in a decrease in the amount or lethality of crime; and third, that any reduction in crime traceable to the ban will not be cancelled out by an *increase* in crime due to the impediment the ban creates to self-defense. Vermont's evidence fails on each score.

Vermont's law is unlikely to have any appreciable effect on the number of banned magazines in criminal hands. For starters, the ban is inherently difficult to enforce, given the numerous exceptions it includes—for grandfathered magazines, current and retired law-enforcement officers, and the like, *see* 13 V.S.A. § 4021(d)—and given the ubiquity of these magazines in other states. Because magazines do not contain serial numbers or other identifying marks, it is difficult to tell whether any given magazine was lawfully sold before the ban or to an exempt individual, rather than acquired illegally. David Scherr, Assistant Attorney General, Vermont Office of the Attorney General, *Testimony on S. 55 before the Senate Committee on the Judiciary* (Mar. 28, 2018). Indeed, it was precisely because of these inherent obstacles to enforcement that the Attorney General's office initially *opposed* the magazine ban. Because "it will be extremely difficult to tell the difference between magazines" lawfully possessed under the ban and those acquired illegally, Assistant Attorney General David Scherr testified before the Senate Judiciary Committee, the Attorney General had "serious concerns about the practical enforceability" of the ban, and he thus did *not support it*. *Id*. While Vermont Attorney General Donovan apparently supports the ban now, this Court should give great weight to the legislative testimony, on his behalf, raising these serious concerns about its "practical enforceability." *Id.*

These difficulties with enforcement are compounded by the ease with which magazines acquired legally out-of-state may be brought into Vermont. Magazines of any capacity remain

freely available for sale across the border in New Hampshire—a short drive away from even the most remote corner of the State. It blinks reality to suggest that the number of so-called "high capacity" magazines in criminal hands will be appreciably reduced by effectively requiring criminals to drive across the Connecticut river into New Hampshire to obtain them. Indeed, even pro-gun-control social scientist Christopher Koper has acknowledged that the effectiveness of "state-level" bans like Vermont's "is likely undermined to some degree by the influx of [prohibited arms] from other states." CHRISTOPHER S. KOPER, ET AL., AN UPDATED ASSESSMENT OF THE FEDERAL ASSAULT WEAPONS BAN 6, at 81 n.95 (2004).

While law-abiding citizens will be deterred by the ban from acquiring magazines illegally, there is thus nothing to stop those bent on violent crime from obtaining the banned magazines illegally. After all, "most of the methods through which criminals acquire guns and virtually everything they ever do with those guns are *already* against the law." JAMES D. WRIGHT & PETER H. ROSSI, ARMED AND CONSIDERED DANGEROUS xxxv (2d ed. 2008). Accordingly, empirical studies "show fairly consistently that many guns [used by criminals] are stolen or borrowed, rather than purchased in the primary market" from a licensed retailer. NATIONAL RESEARCH COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 88 (Charles F. Wellford, John V. Pepper & Carol V. Petrie eds. 2004).

This is not a novel proposition. In a passage Thomas Jefferson copied into his personal quotation book, the influential Italian criminologist Cesare Beccaria reasoned that bans on the

> wear[ing] of arms . . . disarm[ ] those only who are not disposed to commit the crime which the laws mean to prevent. Can it be supposed, that those who have the courage to violate the most sacred laws of humanity, and the most important of the code, will respect the less considerable and arbitrary injunctions, the violation of which is so easy, and of so little comparative importance? . . . [Such a law] certainly makes the situation of the assaulted worse, and of the assailants better, and rather encourages than prevents murder.

See Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right To Bear*

Arms, 49 LAW & CONTEMP. PROBS. 151, 154 (1986).

The ban's likely lack of effect is further supported by the results of the now-defunct *federal* ban on magazines with a capacity of more than ten rounds, which was in place from 1994 until 2004. In 2004, the Department of Justice commissioned a study of the federal ban's effects, and the study's author, Christopher Koper, concluded that the ban had "[f]ail[ed] to reduce" criminal use of the magazines, which were actually used in "steady or rising" numbers in the jurisdictions studied. Christopher S. Koper, *America's Experience with the Federal Assault Weapons Ban, 1994–2004*, *in* REDUCING GUN VIOLENCE IN AMERICA 157, 164 (Daniel W. Webster & Jon S. Vernick eds., 2013); *see* KOPER, *supra*, at 68–79.

Even if the State's ban *were* likely to reduce the number of disfavored magazines in criminal hands, Vermont cannot show that this would have any appreciable effect on the rate or severity of violent crime. Indeed, Vermont *itself* does not believe that these magazines are inherently dangerous, for it *exempts* from the ban manufacturers who produce them for commerce *outside the State*. *See* 13 V.S.A. §4201(d)(1)(E)(iii). And the vast majority of gun deaths in Vermont—nearly 90% from 2011-2018—are suicides. *See* Vermont Suicide Prevention Center, *Gunshots Project Update*, http://bit.ly/39t9NqP. The magazine ban clearly will have no effect on suicides.

What is more, magazines that hold more than ten rounds are rarely used in gun crime. According to Koper's research, for instance, *three quarters or more* of violent gun crimes do not involve the use of these magazines *at all*. KOPER, *supra*, at 18. Even if criminals *did* routinely use the banned magazines, the ban would have no effect on violent crime because for the vast majority of crimes, the ability to fire more than ten rounds is irrelevant and criminals rarely fire more than ten rounds. In fact, in many crimes the perpetrators do not fire their weapons *at all*; according to

one study, in nearly one-third of gun crimes the offender did not fire a single shot. D.C. Reedy & C.S. Koper, *Impact of Handgun Types on Gun Assault Outcomes*, 9 INJURY PREVENTION 151, 153 figs.1 & 2 (2003) https://bit.ly/2VOw3aU. And for all the violent crimes in the study in which handguns *were* fired, the average number of rounds fired was around two or three. *Id.* at 152. More than ten rounds were fired in *less than three percent* of these crimes (between 6 and 7 out of 236 crimes), and more than 15 rounds were fired in only around *one percent* (2 or 3 crimes). *Id.* at 154 tbl.1.

Unsurprisingly, when Professor Koper studied the effects of the ten-year federal ban on so-called "high capacity" magazines, his initial 1997 report "found no statistical evidence of post-ban decreases in either the number of victims per gun homicide incident, the number of gunshot wounds per victim, or the proportion of gunshot victims with multiple wounds." JEFFREY A. ROTH & CHRISTOPHER S. KOPER, IMPACT EVALUATION OF THE PUBLIC SAFETY AND RECREATIONAL FIREARMS USE PROTECTION ACT OF 1994 6 (1997). His final, 2004 report similarly concluded that the ban could not be "clearly credit[ed] . . . with any of the nation's recent drop in gun violence" and that "[s]hould it be renewed, the ban's effects on gun violence are likely to be small at best and perhaps too small for reliable measurement." KOPER, *supra*, at 2–3.

The State's (and its amici's) efforts to justify the ban largely revolve around the argument that it will reduce the likelihood or lethality of mass shootings. Vermont Br. 27-28; *see also* Giffords Amicus Br. at 8-9, 23; Br. of Amicus Curiae Everytown for Gun Safety Support Fund at 16–24 (Oct. 14, 2019). But the magazine ban fails any meaningful scrutiny even if the Court focuses solely on its likely effects on these tragic—but highly rare—events. There is no rigorous, systematic study showing how frequently magazines with an 11-plus or 16-plus-round capacity are used in mass shootings, but what research there is suggests that most mass shootings *do not*

involve these magazines. A 2015 study by the anti-gun group Everytown for Gun Safety, for example, found that *89%* of mass shootings between 2009 and 2015 *did not involve* the magazines in question. EVERYTOWN FOR GUN SAFETY, *Analysis of Recent Mass Shootings* 4 (2015) https://every.tw/2PPwopE. Another study found that in 2013, *none* of the 22 mass-shooting events that took place in 2013 were known to have involved the use of magazines with a capacity greater than ten rounds; and only 23 mass shootings involving these magazines occurred in the period between 1994 and 2013—on average, one per year nationally. Gary Kleck, *Large-Capacity Magazines and the Casualty Counts in Mass Shootings: The Plausibility of Linkages*, 17 J. RES. & POL'Y 28, 38–39 (2016). Indeed, the Parkland shooting that was one of the principal motivations for Vermont's ban did not involve magazines with a capacity illegal under Vermont's new law. Nicholas Nehamas & David Smiley, *Florida School Shooter's AR-15 May Have Jammed, Saving Lives, Report Says,* MIAMI HERALD (Feb. 27, 2018).

Even with respect to those mass-shooting events that *did* involve the standard-capacity magazines banned by Vermont, the size of the magazine has been shown to be *irrelevant* to the number of victims. Obviously, a shooter with two 10-round magazines can fire the same number of rounds as one with a single 20-round magazine. And in *every single one* of the mass-shooting events between 1994 and 2013 known to have involved an 11-plus-round magazine, the shooter "possess[ed] either multiple guns or multiple detachable magazines" and thus "could have continued firing without significant interruption by either switching loaded guns or changing smaller loaded magazines." Kleck, *supra*, at 28, 42.

To be sure, changing from one 10-round magazine to another involves some delay; both Vermont and its amici, seizing on this fact, suggest that the ban will reduce the severity of a potential mass shooting because of "the possibility of interruption while shooters reload." Vermont

Br. 29–30; Giffords Amicus Br. at 12–13. But "[s]killed shooters can change detachable magazines in 2 seconds or less, and even relatively unskilled persons can, with minimal practice, do so in 4 seconds." Kleck, *supra*, at 30. The justification for Vermont's ban thus reduces to the argument that this two-to-four second pause while changing magazines will meaningfully increase the likelihood that a bystander will intervene and successfully stop the shooter. But mass shooters almost never maintain a rate of fire fast enough that a two-to-four second delay would appreciably slow them down. *See id.* at 43–44. Confirming the point, there was only *a single* arguable instance, between 1994 and 2013, in which a mass shooter was supposedly disarmed while reloading—and even there, some accounts suggest that the shooter paused because his gun malfunctioned, not because he was reloading. *Id.* at 39–40.

What is more, the above analysis assumes that criminals who plan to carry out a mass shooting would be deterred by Vermont's ban from obtaining magazines of an unlawful capacity. Given the ease with which criminals will continue to be able to unlawfully obtain these magazines, as discussed above, that is an extraordinarily unlikely assumption. Indeed, it is *especially* unlikely with respect to mass-shooters—who typically spend a great deal of time and effort meticulously planning and preparing for their attacks. *See* Kleck, *supra*, at 31–32.

The available social-science evidence strongly confirms that bans like Vermont's have *no demonstrable effect* on the rate of mass shootings. After the federal ban on 11-plus-round magazines expired in 2004, for instance, mass shootings *did not* "increase[ ] in number or in overall death toll." James Alan Fox & Monica J. DeLateur, *Mass Shootings in America: Moving Beyond Newtown*, 18 HOMICIDE STUD. 125, 128 (2014). Accordingly, if the goal behind Section 4021 is to reduce the likelihood or lethality of mass shootings, the ban is "a haphazard solution likely to have no effect on an exceedingly rare problem." *Duncan*, 265 F. Supp. 3d at 1124.

The State's amici point to a handful of studies that they say support the ban, but they do not bear scrutiny. For example, while the analysis by the anti-gun group Everytown for Gun Safety found that use of "high capacity" magazines was associated with higher death rates, that does not show that the use of these magazines *caused* any increase in the number of deaths. *See* EVERYTOWN FOR GUN SAFETY, *supra*, at 4; *see also* LOUIS KLAREVAS, RAMPAGE NATION 257 (2016) (finding use of magazines holding more than ten rounds to be "associated with high death tolls"); Sam Petulla, *Here Is 1 Correlation Between State Gun Laws and Mass Shootings*, CNN (Oct. 5, 2017), https://goo.gl/WnCZVG (finding "correlation" between magazine bans and the number of shooting events but emphasizing that this "is not a causal explanation"). Instead, it is likely that the causality flows in *the other direction*—after all, "people who intend to shoot many people are not only more likely to end up doing so but also prepare for doing so by acquiring equipment that they believe is better suited to this task," such as larger-capacity magazines. Kleck, *supra*, at 32.

In the end, neither the State nor its amici have pointed to a single plausible, causal mechanism by which its magazine ban would prevent or mitigate crime. Indeed, before the magazine ban—and despite its high rates of firearm ownership and unrestrictive gun policies—Vermont's homicide rate consistently was among *the lowest in the nation*. *See* Centers for Disease Control & Prevention, *Homicide Mortality by State*, https://bit.ly/2PPQ1Oy. Indeed, the State experienced fewer than 10 firearm homicides *per year* from 2011 to 2018. *See* Vermont Suicide Prevention Center, *Gunshots Project Update*, http://bit.ly/39t9NqP. There is no evidence that a single one of these homicides would have been prevented by a magazine ban.

Vermont asks the Court to essentially defer to the federal lower-court opinions that have upheld similar bans on the theory that they reasonably advance public safety. But the courts in these cases did not provide any meaningful scrutiny of the Government's supposed public-safety

justifications, instead upholding the bans after little more than a rote recitation of the Government's own self-serving assertions that they would have public-safety benefits. *See e.g.*, *Kolbe v. Hogan*, 849 F.3d 114, 139–40 (4th Cir. 2017). By contrast, the court in *Duncan*—which *did* meaningfully scrutinize California's justifications for its similar magazine ban—concluded that the ban *did not pass intermediate scrutiny*. *Duncan*, 265 F. Supp. 3d at 1121; *see also id.* at 1125 (concluding, after examining evidence similar to that offered by Vermont and its amici, that a magazine ban would have "little or no discernable good effect" in advancing public safety).

Finally, even if Vermont could show (1) that Section 4021 would reduce the number of banned magazines in criminal hands, and (2) that this reduction will meaningfully impact violent crime, it *still* could not show (3) that any such positive public-safety impact would *outweigh* the public-safety *harm* caused by preventing law-abiding citizens from effectively defending themselves. Although the number of defensive gun uses is difficult to measure, the leading study on the issue, the National Self-Defense Survey, "indicate[s] that each year in the U.S. there are about 2.2 to 2.5 million [defensive uses of guns] of all types by civilians against humans." Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense With a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 164 (1995). "At least 19 other surveys have resulted in [similar] estimated numbers of defensive gun uses," NATIONAL RESEARCH COUNCIL, *supra*, at 103, and the estimates are also strongly supported by several studies conducted by the Centers for Disease Control, Gary Kleck, *What Do CDC's Surveys Say About the Frequency of Defensive Gun Uses?* 2 (June 11, 2018). As already discussed, the magazines banned by Vermont are commonly owned by law-abiding citizens for defensive use and they are in fact integral to self-defense in many cases. *See* Kleck & Gertz, *supra*, at 164. According to data from the Bureau of Justice Statistics, in 2008, 797,139 violent crime incidents occurred in which the victims faced

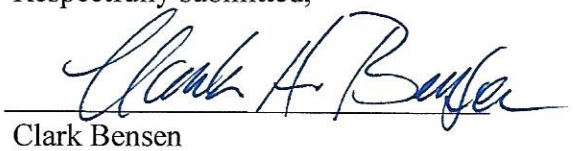
multiple offenders—17.4% of all violent crimes. BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2008 STATISTICAL TABLES tbl.37 (2010). In 247,388 of these violent crimes the victim faced *four or more* offenders. *Id.* And according to a study published in 2005, multiple attackers were involved in 52% of cases where an armed citizen used his or her firearm in self-defense. Kleck & Gertz, *supra*, at 186 tbl.3. Even if Vermont's ban did yield some public safety benefits, Vermont still has not demonstrated that these benefits outweigh the cost of impeding effective self-defense.

Vermont's ban independently fails any meaningful "reasonableness" scrutiny because it is over-inclusive and burdens more constitutionally protected conduct than necessary. *See Baker*, 170 Vt. at 214; *McCullen v. Coakley*, 134 S. Ct. 2518, 2534 (2014). Vermont's failure to properly tailor its ban is apparent from the fact that it applies *at all times* and *in the home*. At a minimum, Vermont should have experimented with less intrusive measures—such as restricting only the public carriage of the magazines in question, imposing more stringent background-check requirements on their purchase, or designing a separate licensing regime tailored particularly to these magazines—before imposing a flat, unconstitutional ban on their possession. This is not to say that these or other measures are *themselves* necessarily free from constitutional doubt, but the *very existence* of such alternative, less onerous restrictions—untried by Vermont—demonstrates that the State "has too readily forgone options that could serve its interest just as well, without substantially burdening the kind of [constitutionally protected conduct] in which [Vermonters] wish to engage." *Id.* at 2537, 2538 n.8.

CONCLUSION

For those reasons set forth above, this Court should declare Vermont's magazine ban unconstitutional and order the court below to dismiss the charges against Defendant Misch.

Respectfully submitted,



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Submitted April 24, 2020

CERTIFICATE OF COMPLIANCE

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Clark Bensen

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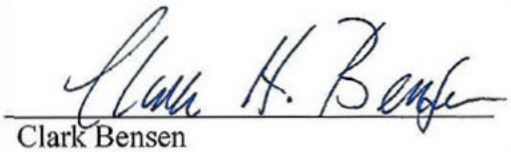

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